IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ISRAEL AGUILERA and
FRANCISCO CAZARES-OLIVAS,

Defendants.

REPORT AND
RECOMMENDATION

06-CR-222-S-2 & 3

REPORT

The grand jury has charged defendants Israel Aguilera and Francisco Cazeres-Olivas with possessing 41 kilos of powder cocaine with intent to distribute. Defendants are scheduled to enter conditional guilty pleas, reserving their right to challenge the lawfulness of the government's seizure of the drugs.

Government agents discovered and seized the cocaine while searching defendants' residence on the basis of telephonic judicial authorization obtained pursuant to Fed. R. Crim. Pro. 41(d)(3). As defendants point out, however, the government and the court did not follow through by preparing the documents required by Rule 41(e)(3). The government concedes the rule violation but argues that suppression is inappropriate because defendants suffered no violation of their Fourth Amendment rights.

As discussed below, the failure to follow Rule 41(e) made this a warrantless search; it was not, however an unreasonable search that would merit suppression of the evidence seized.

FACTS

The facts undergirding the court's oral authorization to search are commemorated in the transcript of the November 20, 2006 telephone call (dkt 9). The only other extant document is the agents' inventory, stapled to the back of the transcript. No actual warrant or other document ever was prepared, submitted to or signed by the court.

By way of synopsis, at 11:37 p.m. on November 20, 2007, this judicial officer returned to chambers to begin a recorded telephone conversation with Assistant United States Attorney Timothy O'Shea and DEA Special Agent William Chamulak. At the time, both defendants were in custody (where they have remained since).

Agent Chamulak presented sworn testimony in support of the government's request for a telephonic warrant to search the residence at 935 South Gammon Road in Madison. Agent Chamulak provided an overview of the DEA's investigation from November 16, 2006 and running up to the present time. Dkt. 9 at 3-9. Led by questions from the government, Agent Chamulak outlined why he expected to find evidence of criminal activity at the Gammon Road residence. *Id*. at 10-13. In response to the court's questions, Agent Chamulak listed the specific items for which the agents would be searching the residence. *Id*. at 13-14. Agent Chamulak then provided detailed descriptors of the residence and explained why nighttime entry was necessary. The government did not seek no-knock authorization. *Id*. at 15-16. I stated:

> I do find that there is probable cause to issue the requested warrant to 935 South Gammon in Madison, Wisconsin, as further described in Agent Chamulak's telephonic testimony to me. I believe that there is probable cause to believe that at least some, if not all, of the contraband, records, money, firearms, paraphernalia,

> will be found there, including probably the brown paper bag that was part of the transaction that was surveilled. I do find that there is good cause for a nighttime search; therefore, the agents do not have to wait until 6:00 a.m. Since they are going to knock and announce I don't have to deal with that. So the bottom line is you've got judicial authorization. It is so ordered. You can send your team in right now. *Id*. at 16-17.

The government arranged for Agent Chamulak to present the return on the telephonic warrant to the court. No one discussed the need for a written warrant or duplicate original warrant as required by F. R. Crim. Pro. 41(e)(3); in fact, no one referenced Rule 41 during the phone call.

The agents began their search at 1:49 a.m. on November 21 2007.[1] No one was home during the search, which concluded at 4:25 a.m. Among the items seized were 41 bricks of powder cocaine cached above a bedroom ceiling.

On November 28, 2006, Agent Chamulak presented to the court the "return on telephonic search warrant for 935 S. Gammon Rd., Madison." The government provided copies of this return to the incarcerated defendants.

ANALYSIS

Rule 41(d)(3) allows the court to issue a search warrant based on information communicated telephonically. The rule requires that the applicant and person providing testimony be sworn and that a verbatim recording of the conversation be made, transcribed and filed.

[1]The entry time is commemorated on the return, appended to Dkt. 9.

Rule 41(e) requires that if the court proceeds under Rule 41(d)(3)(A), the government must prepare a "proposed duplicate original warrant" and read it to or otherwise transmit it to the court. The judge must enter the contents of the proposed warrant into an "original" warrant, sign the original, enter on its face the exact time it is issued, then direct the AUSA to sign the judge's name on the duplicate original warrant.

Neither the government nor this court prepared a warrant or a proposed duplicate original warrant. This was a negligent omission, not an intentional or reckless one.[2] As a result, the agents had no document that they could present to whoever might answer the door at 935 South Gammon Road. This failure to comply with Rule 41(e) has led defendants to label this a warrantless search which is *per se* unreasonable under the Fourth Amendment. *See Katz v. United States*, 389 U.S. 347, 357 (1967). What the Court actually held in *Katz* is a bit less emphatic:

> [T]he Constitution requires that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police. Over and again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes, and that *searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable* under the Fourth Amendment, subject to a few specifically established and well-delineated exceptions.

389 U.S. at 357, citations and footnotes omitted, emphasis added.

In other words, the Court's emphasis in *Katz* is on substantive judicial review and approval, not the preparation of the piece of paper commemorating the court's review.

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[2] Not knowing what one "should have known" is negligence, not recklessness. *See United States v. Ladish Malting Co.,* 135 F.3d 484, 487-88 (7th Cir. 1998).

On the other hand, the Court's 5-4 opinion in *Groh v. Ramirez*, 540 U.S. 551 (2004), reminds us not to underestimate the importance of the written warrant. *Groh* was not a suppression case; it was a *Bivens* civil lawsuit against an ATF agent who had provided an adequate search warrant *application* to the magistrate judge but had presented an incorrectly-typed draft *warrant* that erroneously described the property to be seized as the suspects' house (essentially a clerical error). *Id*. at 554. The court signed the incorrectly-typed warrant, the agents executed it (taking nothing), then were sued by the residents. According to the Court, the warrant clearly was invalid because it did not describe the items to be seized with particularity. *Id.* at 557. The agent should have known that this warrant was invalid because he typed it; therefore it was proper to allow the civil lawsuit against him to proceed.[3]

The dissent's view was more charitable, observing that although the "physical existence of the warrant and its typewritten contents" serves a high function,

> The Warrant Clause's principle protection lies in the fact that the Fourth Amendment has interposed a magistrate between the citizen and the police so that an objective mind might weigh the need to invade the searchee's privacy in order to enforce the law.

Groh, 540 U.S. at 575 (Thomas and Scalia, JJ., dissenting), citations omitted.

Reviewing the facts before the Court, the dissent observed that "putting aside the technical defect in the warrant, it is hard to imagine how the actual search could have been carried out any more reasonably." *Id.* at 577. Noting that the text of the Fourth Amendment did not explicitly

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[3] The Court distinguished this case from *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), because in *Sheppard*, the magistrate judge had assured the agents that he would take the steps necessary to conform the warrant with constitutional requirements, while in *Groh*, the agent personally had typed the incorrect description into the draft warrant that the court then signed. *Id*. at 561, n. 4.

require warrants, the dissent surveyed the Court's prior search cases and declared that "our cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not." *Id.* at 572-73.

Turning to the instant case, defendants are correct that this was a warrantless search. Although the court orally authorized Agent Chamulak and his colleagues to search defendants' residence, the court never issued an actual warrant.

The government argues that the salient question is not whether the government and the court violated Rule 41(e)(3), but whether the defendants' constitutional rights were infringed. This is a logical approach up to a point, but it probably frames the issue too narrowly, since the failure to comply with Rule 41(e)(3) = a failure to issue a warrant. With that in mind, the cases cited by the government provide some guidance in determining whether the warrantless search of defendants' residence should result in suppression of the evidence seized. In *United States v. Trost*, 152 F.3d 715 (7th Cir. 1999), the court held that

> It should be clear after *United States v. Leon*, 468 U.S. 897 (1984) that technical defects in a warrant do not call for or permit exclusion of what the search produces. . . . Foibles in the administration of Rule 41 are not grounds for exclusion. In light of *Leon*, it is difficult to anticipate any violation of Rule 41, short of a defect that also offends the Warrant Clause of the fourth amendment that would call for suppression. Many remedies may be appropriate for deliberate violations of the rules, but freedom for the offender is not among them.

Id. at 722, citations omitted.[4]

[4] The government observes that the Court of Appeals for the Ninth Circuit has a more complicated test to review violations of Rule 41, requiring suppression when: (1) a violation of constitutional magnitude has occurred; (2) the defendant was prejudiced in the sense that the search would not have

Of course, there was no warrant here, so it likely undersells the scope of the error to characterize it as a foible in the administration of Rule 41. On the other hand, notwithstanding the violation of Rule 41(e), this warrantless search was not unreasonable under the totality of the circumstances. Prior to entering defendants' residence to search, the agents presented to the court an affiant who recited under oath the facts establishing probable cause. This court independently assessed the facts and determined that there was probable cause for the requested search. Both the residence to be searched and the items to be seized were described with particularity. The court explicitly set out the limits of Agent Chamulak's authority to search. The agents' time of entry is commemorated on the return, which also specifies all items seized. The government provided the defendants, through counsel, with copies of the inventory. As a practical matter, the absence of a written warrant at the time of entry had no real-life ramifications: both defendants had been arrested and detained by agents earlier that same evening. No one was in the residence when the officers arrived; even if a duplicate warrant had been prepared, there was no one home to whom the agents could have presented it to assure them that this was a judicially authorized search.. *Cf. Katz v. United States*, 389 U.S. at 356

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occurred or would not have been so abrasive if Rule 41 had been followed; or (3) the officers acted in intentional and deliberate disregard of a provision of the rule. *See United States v. Williamson*, 439 F.3d 1125, 1133 (9th Cir. 2006).

The government argues that the challenged search in the instant case would pass muster even under this more rigorous review. This may or may not be true, depending on how one characterizes the failure to prepare a written warrant: was this a violation of the Warrant Clause or not?

As for parts (2) and (3) of the Ninth Circuit test, the government is correct that the defendants were not prejudiced and the agent did not act in intentional or deliberate disregard of the rule.

n.16 (Rule 41(d) does not invariably require service of a copy of the warrant before the search takes place). Acknowledging the importance of having a physical warrant, "it is hard to imagine how the actual search could have been carried out any more reasonably." *Groh*, 540 U.S. at 577 (Thomas and Scalia, JJ., dissenting).

Apart from the objective reasonableness of what actually occurred, the government argues that pursuant to *Leon*, evidence seized in violation of the Warrant Clause should be suppressed only when the agent lacked a good faith belief in the validity of his warrant. 468 U.S. at 920-22. The government bears the initial burden of establishing the officers' good faith, but the agent's decision to seek a warrant from the court is *prima facie* evidence of good faith.

Defendants respond that *Leon* presumes the issuance of an actual warrant; here there was none, so *Leon* cannot apply. How could Agent Chamulak presume a non-existent warrant to be valid? Defendants then quote *Arizona v. Evans*, 514 U.S. 1, 20 (1995) for the proposition that "the reasoning in *Leon* assumed the existence of a warrant; it was, and remains wholly inapplicable to warrantless searches and seizures." But this quote is from the dissent. The Court's opinion was to the contrary, applying the reasoning of *Leon* to negligent record-keeping by government clerical employees that resulted in an unlawful arrest. The Court noted that its more recent case law had rejected reflexive application of the exclusionary rule, emphasizing instead that the issue of exclusion is separate from whether the Fourth Amendment had been violated. Exclusion is appropriate only if the remedial objectives of the rule are thought most efficaciously served. *Evans*, 514 U.S. at 14. The Court found that the good faith doctrine could be applied to errors for which the court was responsible. *Id*. at 14-15. *See also Massachusetts v.*

Sheppard, 468 U.S. 981, 988 (1984)(where judge assured officers he would edit and correct a defective draft warrant but failed adequately to do so, officers' mistaken belief in warrant's validity still was objectively reasonable).

So, it is not clear whether the good faith doctrine applies on these facts. On the one hand, there was no actual warrant. Shouldn't this have been a huge red flag? But on the other hand, the agent was attempting to obtain a warrant and relied in good faith on the AUSA guiding him through the telephonic warrant application process, and then he relied on this court's verbal authorization that he could search defendants' residence. A midnight telephonic warrant obviously was out of the mainstream for all involved, so the agent cannot be blamed for not knowing the requirements of the subpart of a rule that both the prosecutor and the court neglected to invoke and follow. If an experienced federal prosecutor and two-term magistrate judge did not read deeply enough into Rule 41 to discover and comply with the requirements of subpart (e), this error cannot be laid at the agent's feet.

The fact that the DEA and the U.S. Attorney's Office went to the trouble of obtaining late night telephonic authorization from the court establishes that they were trying to comply with the rules and the Warrant Clause as they understood them. This resulted in a recorded 26-minute conversation with the court during which the government's probable cause, the specific location and description of the residence, and the items to be seized were discussed in great detail prompting the court to conclude, "The bottom line is you've got judicial authorization. It is so ordered. You can send your team in right now." Dkt. 9 at 17. To the extent this directive might have violated the Fourth Amendment, this judicial officer blew it and so did the

prosecutor, albeit inadvertently. (As the government points out, there was nothing to gain by not preparing a written warrant and it would have been simple to do if we had thought to do it). But there was nothing else that Agent Chamulak or his colleagues could have done or reasonably could have been expected to do in light of the court's authorization, with which the AUSA was concurring.

Assuming, *arguendo*, that the good faith doctrine is inapplicable to this situation, suppression still is inappropriate. In *United States v. Harju*, 466 F.3d 602, 605 (7th Cir. 2006), the court observed that "the prime purpose of the [exclusionary] rule, if not the sole one, is to deter future unlawful police conduct," and noted that this focus on deterrence led the Supreme Court recently to contract the rule's scope. *See Hudson v. Michigan*, 126 S.Ct. 2159, 2168 (2006). The court in *Harju* quoted at length from *United States v. Leon*, 468 U.S. 897 (1984), noting that even if there were a violation of a defendant's fourth amendment rights, a court must weigh carefully the costs and benefits of preventing the use of inherently trustworthy evidence obtained in reliance on a search warrant, issued by a detached and neutral magistrate, that ultimately was found to be defective; therefore, the rule should operate to exclude evidence only when it will deter police misconduct. *Harju*, 466 F.3d at 605. Here, the AUSA and this court inadvertently failed to heed Rule 41(e); the police did nothing wrong. No remedial purpose would be served by suppressing this evidence.[5]

[5] As part of its *mea culpa*, the government reports that it is developing written procedures, checklists and forms that it will employ in all future requests for telephonic search warrants.

As noted in *dicta* in *United States v. Elder*, 466 F.3d 1090,(a case ultimately decided on the "public safety" doctrine),

> The main requirement of the fourth amendment, after all, is that the search be reasonable. The exclusionary rule comes at such cost to the administration of the criminal justice system that its application might sensibly be confined to violations of the reasonableness requirement. When a warrant is sure to issue (if sought), the exclusionary "remedy" is not a remedy, for no legitimate privacy interest has been invaded without good justification, but is instead a substantial punishment of the general public. . . . Allowing the criminal to go free because of an administrative gaffe that does not affect substantial rights seems excessive.

Id. at 1090.

Again, without intending to minimize the importance of issuing an actual warrant, nothing that happened on November 20-21, 2006 affected defendants' substantial rights. A warrant was "sure to issue" in this case if the prosecutor had cited Rule 41(e) or if the court independently had researched the point prior to turning on the recording device. No legitimate privacy interest of either defendant was invaded without good justification. Suppression of the evidence seized would substantially punish the general public and allow defendants to go free because of what was, at its heart, an administrative gaffe. Nothing that the DEA, the prosecutor or this court did in this case is so opprobrious as to merit the sanction of exclusion.

CONCLUSION

I am chagrined that AUSA O'Shea and I failed to read and comply with Rule 41(e) when attempting to work through the DEA's late night request to search defendants' residence. This oversight, while unintentional, was serious: it resulted in the judicial authorization of a search without the provision of an actual warrant. This failure to prepare a physical document may have violated the Warrant Clause. On these facts, however, it did not result in an unreasonable search or seizure because the court's authorization to search was supported by probable cause and it specified the place to be searched and the items to be seized. The agent seeking the warrant did everything asked of him by the prosecutor and the court, and was under the objectively reasonable impression that he had a valid basis to search defendants' residence. Suppressing the evidence on in this situation would result in an unnecessary and unreasonable windfall to the defendants at the expense of the public.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendants' motion to suppress evidence.

Entered this 22nd day of February, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

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Re: United States v. Israel Guilera and Francisco Cazares-Olivas
Case No. 06-CR-222-S

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the newly-updated memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before March 5, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by March 5, 2007, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable John C. Shabaz, District Judge